United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

16-2010

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

CARLSON TANNER, JR., Petitioner-Appellant,	:	Docket No. 76-2010
v.	:	
LEON VINCENT, Warden of Green Haven Prison, Stormville, New York, Respondent-Appellee.	:	

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BRIEF OF PETITIONER-APPELLANT CARLSON TANNER, JR.

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BRIEF OF PETITIONER-APPELLANT CARLSON TANNER, JR.

Preliminary Statement

This is an appeal from a decision rendered by Judge Mark A. Costantino, denying petitioner-appellant's application for a writ of habeas corpus, in a Memorandum and Order dated November 3, 1975.

Issues Presented for Review

1. The admissibility of an incriminatory statement, which had been obtained after Miranda* warnings, but which had been preceded by similar statements obtained without such warnings.

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* Miranda v. Arizona, 384 U.S. 436 (1966)

2. The admissibility of an incriminatory statement which had been part of the "dry run" preceding a formal statement where the dry run (unlike the formal statement) had not been disclosed at the Huntley* hearing required by Jackson v. Denno, 378 U.S. 368 (1974).

Statement of the Case

On April 10, 1969, after trial by jury, petitioner-appellant Carlson Tanner, Jr. ("Tanner") was convicted by the New York State Supreme Court, Queens County, of robbery first degree, manslaughter second degree, and possession of weapons and instruments. He was sentenced to a maximum of forty years. He is presently in the custody of respondent-appellee Leon Vincent, Warden of Green Haven Prison, Stormville, New York.

Tanner appealed to the Appellate Division, Second Department, which affirmed without opinion on February 1, 1971, 36 App. Div. 2d 690. He then appealed to the Court of Appeals of the State of New York, which affirmed on March 15, 1972. A copy of the opinion of the Court of Appeals is annexed, 30 N.Y.2d 103.

On April 17, 1975 Tanner filed a petition for a writ of habeas corpus (28 U.S.C. §2254) in the United States

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* People v. Huntley, 15 N.Y.2d 72 (1965).

District Court for the Eastern District of New York. Judge Mark A. Costantino on June 9, 1975 ordered respondent-appellee to show cause why the writ should not issue. By Memorandum and Order dated November 3, 1975 Judge Costantino denied Tanner's application for a writ.

On November 25, 1975 a notice of appeal to this Court was filed with the District Court.

By Memorandum and Order dated December 18, 1975 Judge Costantino denied Tanner's request for a certificate of probable cause to appeal. On January 27, 1976 this Court granted the certificate.

The background of Tanner's conviction is as follows:

On March 15, 1968 Tanner and a co-indictee, Kenneth Fulmore, stopped a taxi and then forced the driver to take them to an isolated area. There the driver was robbed and fatally shot. Tanner and Fulmore each sought to put the blame for the crime on the other.

At his trial Tanner testified in his own defense. Fulmore testified for the prosecution.

The principal evidence of Tanner's participation in

the crime (other than Fulmore's testimony) was an inculpatory statement which he allegedly made to two Assistant District Atrorneys and to one of the arresting detectives. These three individuals testified that, while Tanner was being interrogated, he said that Fulmore had proposed robbing the taxi driver and that Tanner had replied "All right...let's take him", or words to that effect. At the Huntley hearing (required by Jackson v. Denno) the prosecution presented evidence as to four of five interrogations which had been made of Tanner.

1. Tanner was arrested in his apartment by Detective Katz and two other detectives around 10:00 a.m. on March 15, 1968. Tanner was given warnings in purported compliance with Miranda, and was then interrogated in the apartment (14, 15, 20).*

2. Around 10:30 a.m. Tanner was taken by Detective Katz and one of the other detectives to the station house in a police car. The interrogation continued en route (29-31, 33).

3. Tanner arrived at the station house around 11:30 a.m. He remained in the custody of Detective Katz until the arrival of Assistant District Attorney Lombardino around 1 p.m.

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*Numerical reference are to the minutes of the trial which include the minutes of the Huntley hearing which immediately preceded it. The minutes are not part of the Record on Appeal but will be furnished to the Court prior to oral argument.

Interrogation by Detective Katz continued during this period (31, 34).

4. Lombardino first conferred with Katz to learn the results of his interrogations of Tanner (65). Next, Lombardino indicated to Tanner that he had conferred with Katz:

> "...I had told the defendant [Tanner] 'I understand you told the detectives what happened,' and he said, 'Yes, I did.' I said, 'Now, I want to reduce it to a formal statement,' and he said he understood..." (74).

Lombardino's testimony, at the Huntley hearing, created the impression that he next gave Tanner Miranda warnings and proceeded directly to a formal, recorded statement in question and answer form. At the trial, however, it developed that Lombardino had first conducted an exploratory interrogation of Tanner, which he characterized as a "dry run". It was allegedly intended as preparation for the more formal interrogation which immediately followed (270-271).

5. Lombardino then took a formal statement from Tanner which was recorded by a stenographer and typed in question and answer form (the "Q & A") (267).

Another Assistant District Attorney, Nicolosi, and Detective Katz were present during both the dry run and the Q & A.

The Court at the Huntley hearing found that the warnings which preceded the first three interrogations had not complied with Miranda: Tanner had not been advised that he was entitled to counsel at that particular stage of the proceeding (120-121). As to the Q & A, however, the Court found that the warnings which immediately preceded it had complied with Miranda and that the Q & A would be admissible at the trial (122-123).

No finding was made at the Huntley hearing with respect to the admissibility of the dry run because the prosecution had not indicated that in fact there had been a dry run.

At the trial, the two Assistant District Attorneys and the Detective were allowed to testify as to the above-quoted inculpatory remark allegedly made by Tanner at the station house. On cross-examination all three witnesses conceded that the remark does not appear in the Q & A but only in the dry run which preceded it (215-219, 274-277, 341-344).

At the trial Tanner's counsel had urged that Tanner's statements at the station house had been made without an awareness that Tanner's earlier statements were inadmissible. Subsequent Miranda warnings at the station house therefore served no purpose, and the station house statements should not have been admitted in evidence. Tanner's counsel argued

that the admission of such statements violated Tanner's privilege against self-incrimination and his right to counsel.

Tanner's counsel also urged at the trial that the admission in evidence of the dry run was a denial of due process because the dry run had not been passed on (or even mentioned) at the Huntley hearing held in purported compliance with the requirements of Jackson v. Denno.

ARGUMENT

I

TANNER'S PRIVILEGE AGAINST SELF-INCRIMINATION AND RIGHT TO COUNSEL WERE VIOLATED BY THE ADMISSION OF AN INCRIMINATORY STATEMENT, OBTAINED AFTER PROPER MIRANDA WARNINGS, BUT WITHOUT TANNER BEING AWARE THAT EARLIER INCRIMINATORY STATEMENTS WERE INADMISSIBLE BECAUSE OF A FAILURE TO COMPLY WITH MIRANDA.

This appeal raises the issue of the admissibility of an incriminatory statement which has been obtained after proper Miranda warnings but which has been preceded by a statement obtained without such warnings. Tanner's argument is that, unless a defendant is made aware of the inadmissibility of the earlier statement, subsequent Miranda warnings serve no purpose and cannot make a later statement admissible.

If the person conducting the second interrogation knows the results of the first interrogation, and, equally important, the defendant knows that such person knows, then the defendant will see no reason to be silent. In other words there would be a reason for silence only if the defendant knew that the statement at the first interrogation had been improperly obtained and could not be used against him. Otherwise, the defendant would believe that the cat is out of the bag, so to speak, and that there is no purpose in not repeating

the first statement.

The decisional law, subsequent to Miranda, as it has evolved in most courts supports the interpretation of Miranda urged here. The habeas corpus proceeding in this Court, involving Stephen J. B., is almost identical with the present proceeding. There Judge Weinstein granted the writ in the District Court and his decision was affirmed by this Court. United States ex rel Stephen J. B. v. Shelly, 305 F. Supp 55 (1969); aff'd as modified 430 F.2d 215 (1970). In Stephen J. B. a policeman had apprehended the petitioner, a sixteen year old, with a stolen car. After being given warnings which did not comply with Miranda, Stephen admitted the car was stolen. Promptly thereafter another policeman arrived on the scene. Stephen admitted to him also that the car was stolen. The second officer then gave Stephen proper Miranda warnings and asked him if he waived his right to remain silent. The response was affirmative, and Stephen again admitted the car was stolen. He was then taken to the police station, again given Miranda warnings, and again confessed. At the trial in State Supreme Court the last two confessions were admitted, and this action was affirmed by the New York Court of Appeals. People v. Stephen J.B., 23 N.Y. 2d 611 (1969).

In the subsequent habeas corpus proceeding this Court and the District Court phrased the question in terms of whether Stephen had, in fact, voluntarily waived his Miranda rights. This precise question it was felt had not been before the New York State courts; and it was held that there had not been such a waiver. The following quotation from Judge Kaufman sets forth the rationale of the decisions:

> "As we have indicated, both the state and federal courts agree here that the original admissions...were improperly secured. Whether we characterize the rationale as the "cat-out-of-the-bag" theory or not, the simple, likely conclusion is that when a suspect, in the rapid sequence of events present here, has already admitted his guilt, he will be far less likely to give intelligent consideration to later requests to waive his right to remain silent and to have counsel present, since he will regard them as meaningless...Had petitioner been told that his prior admissions were invalid, or were there even the slightest basis in the record for inferring that he might have known that he had not yet legally incriminated himself when he made the third and fourth admissions, we might decide otherwise; but he was not, and there is not. The factors are closely intertwined and each admission cannot be viewed without reference to what happened so shortly before. And his age and his lack of prior contact with the police militate not only against finding a waiver, but against a specific finding of awareness of the invalidity of his first admissions." 430 F. 2d at 218.

The foregoing passage indicates that the decisive element was Stephen's unawareness that his "prior admissions

were invalid". Without such awareness no decision to waive Miranda rights could have a rational basis. This, of course, was exactly Tanner's situation here. Since Tanner did not know, or even suspect, that his earlier statements were invalid, his waiver of his rights at the station house was not a meaningful decision and he should not have been bound thereby.

Inexplicably the New York Court of Appeals in the present case was uninfluenced by the habeas corpus decisions in Stephen J. B. It distinguished these decisions with the following comment:

> "The Federal court found the admission of the petitioner there, a 16 year-old boy, was not based on an intelligent waiver, and one factor, not apparently the controlling one, was the finding by the Federal court that having made a prior statement improperly elicited this let the 'cat-out-of-the-bag' and affected his subsequent statement..." (p. 106)

This analysis is debatable, to say the least. Any interpretation that the earlier, improperly elicited statement was not a "controlling" factor ignores most of the language, as well as the substance, of the passage quoted above from the opinion of this Court.

It is true, as the New York Court of Appeals noted, that the youth and inexperience of Stephen were additional considerations which affected his inability to make a meaningful

waiver of Miranda rights. Yet the differences between him and Tanner are not so great as to compel a different approach here. Stephen was 16 and he had never been in trouble with the police. Tanner also, although somewhat older - 27 had not been in trouble with the police during the previous ten years.*

Judge Costantino, in the court below, in denying Tanner's application for a writ of habeas corpus, also refused to recognize Stephen J. B. as a precedent. He seems to have done so for two reasons both of which are inappropriate.

A. Judge Costantino's pivotal finding appears to be the following:

> "At no point did petitioner [Tanner] state at the Huntley hearing that the reason he made the later confession was because it was futile not to do so because of the earlier confessions." (p. 3)

This reflects a misreading of Stephen J. B. Nothing there requires a finding that the earlier confession be expressly stated by the defendant to have been the reason for the subsequent confession. This Court made no finding that Stephen had said (as Judge Costantino would require) "that the reason he made the later confession was because it

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* In People v. Chapple, 38 N.Y.2d 112 (1975) the New York Court of Appeals, although distinguishing the case before it from Tanner, appeared to be using an approach similar to that employed by this Court in Stephen J.B.

was futile not to do so". No such finding was necessary there; and no such finding should be needed here. Stephen J. B. relied on the "simple likely conclusion; and the "simple likely conclusion" here is the same.* In both Stephen J. B. and the instant case the defendant was "far less likely to give intelligent consideration to later requests to remain silent" than would have been the case "had he been told that his prior admissions were invalid".

In one respect, Tanner presents a stronger case than did Stephen J. B. Here the Assistant District Attorney who elicited the final statements used the earlier incriminatory statements in a way which is strong evidence that the earlier statements were the reason for the final statements. ADA Lombardino testified as follows:

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* To repeat a portion of this Court's language quoted earlier:

> "...the simple likely conclusion is that when a suspect, in the rapid sequence of events present here, has already admitted his guilt, he will be far less likely to give intelligent consideration to later requests to waive his right to remain silent and to have counsel present, since he will regard them as meaningless... Had petitioner been told that his prior admissions were invalid, or were there even the slightest basis in the record for inferring that he might have known that he had not yet legally incriminated himself when he made the third and fourth admissions, we might decide otherwise...."

> "...prior to taking the statement I had told the defendant, 'I understand you told the detectives what happened,' and he said, 'Yes, I did.' I said, 'Now, I want to reduce it to a formal statement,' and he said he understood and that's when I proceeded to apprise him of his rights." (74)

Although Judge Costantino's attention was directed to this testimony, it is ignored in his Memorandum and Order.

B. Judge Costantino's failure to apply Stephen J. B. may have resulted, in part, from his misunderstanding of Tanner's contentions. The Memorandum and Order stated that it is Tanner's "claim that he confessed subsequent to receiving Miranda warnings only because of his prior inadmissible confession..." (emphasis supplied). This is inaccurate. Tanner's position has always been that his prior inadmissible confession was one of several factors responsible for his subsequent confession. A similar analysis was used by this Court in Stephen J. B.

> "The 'cat-out-of-the-bag' theory is hardly the only evidence pointing to the absence of a legally sufficient waiver. Petitioner was 16 years of age at the time of the events described. He had never been in difficulty with the police before, but on this particular night he was recaptured after fleeing from a stolen car, virtually held up by the scruff of the neck, handcuffed and taken to the police station." (p. 219)

Judge Costantino ignored the fact that, as mentioned earlier,

although Tanner was somewhat older, he had not been in trouble with the police in any way for at least 10 years; and Tanner was handcuffed immediately after he was arrested.

The Courts of Appeal in other Circuits have used an approach identical with that employed in Stephen J.B. United States v. Pierce, 397 F.2d 1[illegible] (4th Cir. 1968) is illustrative. There, after a first confession to local police without Miranda warnings, the defendant was interrogated by FBI agents who gave Miranda warnings and to whom defendant then repeated his confession. The following quotation indicates why the second as well as the first confession were held inadmissible:

> "The FBI entered the fray armed with defendant's earlier admissions to the [local] police, and it is most probable that defendant was aware of the fact. Defendant's knowledge, of this fact coupled with the agent's warning conveyed the idea that though defendant could remain silent if he wished, he might as well answer the questions put to him since the agent was already aware of the earlier answers. The decision hardly can be termed voluntary.... Warning after the admission is too late, and the bare fact of subsequent repetition to the same

or a cooperating officer cannot make the admission admissible." (397 F.2d at 131)

Using this analysis here, there would seem no question that Tanner's statements at the station house were motivated by the fact that he had earlier made similar statements on three successive occasions to the arresting detectives. As pointed out above, the Assistant District Attorney who conducted the interrogation told Tanner that he knew of his earlier statements. In addition, one of the arresting detectives was present during the interrogation. Tanner had no way of knowing that the earlier warnings by the detectives had not complied with Miranda and that Tanner's earlier statements were therefore inadmissible. In other words, so far as Tanner could tell, the cat was out of the bag, and the subsequent Miranda warnings were necessarily meaningless.

II

TANNER'S RIGHT TO DUE PROCESS WAS VIOLATED BY THE ADMISSION OF TESTIMONY AS TO AN ALLEGED INCRIMINATORY STATEMENT MADE BY HIM DURING AN EXPLORATORY INTERROGATION, BECAUSE THE PROSECUTION, AT A JACKSON V. DENNO HEARING, DID NOT DISCLOSE THAT SUCH TESTIMONY WOULD BE INTRODUCED AND INDICATED THAT IT WOULD INTRODUCE ONLY THE WRITTEN RECORD OF A SUBSEQUENT FORMAL INTERROGATION.

Jackson v. Denno requires that a defendant be provided with an opportunity, prior to trial, to have a court determination of whether or not an admission has been obtained voluntarily. The procedure followed at the Huntley hearing in the instant case denied Tanner such an opportunity and hence deprived him of his Jackson rights.

As previously mentioned, Tanner was twice interrogated by an Assistant District Attorney at the station house. The first interrogation was exploratory, and was characterized as a dry run. A formal interrogation followed. This was recorded by a stenographer and has been referred to as the Q & A.

As also previously mentioned, at Tanner's trial two Assistant District Attorneys and a detective testified that Tanner had described his role in the crime as follows:

When Tanner and the co-indictee Fulmore were in the taxi, Fulmore proposed robbing the driver to which Tanner allegedly replied: "All right...let's take him". This quotation is the only admission of Tanner that connects him with the crime. Obviously, it is of the utmost importance. Yet it does not appear in the Q & A and can only have been derived from the dry run.

At the Huntley hearing, however, the prosecution indicated to Tanner only that at his trial it would introduce the Q & A. Tanner was not told that the prosecution would also offer testimony from the dry run. This, of course, deprived Tanner of all opportunity to establish, at the Huntley hearing, the involuntariness of the dry run. It also may have impaired petitioner's ability to establish the involuntariness of the Q & A.

Counsel for Tanner first learned that the prosecution was relying on the dry run, through cross-examination at the trial of the three prosecution witnesses who testified as to Tanner's incriminatory statement. At this point, however, the trial was well under way, and counsel's opportunity for meaningful cross-examination was far less than it would have been had the dry run been under consideration at the Huntley hearing. The whole point of Jackson v. Denno is

that defense counsel will have an opportunity to explore the voluntariness of a confession prior to trial. This unique protection was totally denied Tanner so far as the dry run was concerned.

The failure to disclose the intended reliance on the dry run also impaired the effectiveness of the Huntley hearing in respect of the Q & A. Tanner's counsel there cross-examined the two Assistant District Attorneys and the detective. All three testified as to the Miranda warnings which preceded the Q & A. But such cross-examination was necessarily conducted in ignorance of what may be significant evidence as to the involuntariness of the Q & A as well as the involuntariness of the dry run: the inconsistency between the Q & A and the dry run concerning Tanner's participation in the crime. Accordingly, by failing to disclose at the Huntley hearing its contemplated reliance on the dry run the prosecution denied Tanner his rights under Jackson v. Denno so far as concerns the Q & A as well as the dry run.

The New York Court of Appeals simply failed to comprehend what went on at either the Huntley hearing or at the trial, so far as the dry run is concerned. The Court's opinion is inaccurate in almost every respect.

It, for example, contains the following statement:

> "At the Huntley hearing there was extensive testimony as to the warnings given by the assistant district attorney before any admissions were made including the "dry run" questions. Defendant inquired fully into this examination. Thus defendant was advised of the nature of this preliminary questioning and of its circumstances and had adequate notice that his admissions would be offered at the trial. (p. 107)

A review, however, of the 120 pages of the Huntley hearing transcript and the 6 pages of the Huntley Court's decision appended thereto, discloses not a single reference to the dry run (1-126). (Neither the Huntley Court nor, so far as appears, even Tanner's own counsel had any idea that there had in fact been a dry run.) The transcript is devoted entirely to the formal interrogation which was embodied in written question and answer form. The prosecution testified only as to the formal interrogation and gave no indication that there had been any preliminary interrogation or dry run.

The opinion of the Court of Appeals is equally uncomprehending in another respect:

> "Nor was there any such inconsistency between the dry run exploratory statement and the question and answer statement as to require its suppression

> because it does not 'appear' in the latter. The assistant district attorney testified on cross-examination that the two statements correspond factually 'in substance' (p. 107)

As pointed out earlier, however, the two statements do not "correspond factually." If they had, it would have been unnecessary for the prosecution to introduce testimony from the dry run. The incriminatory statement ascribed to Tanner can only be derived from the dry run: it nowhere appears in the Q & A. (The complete Q & A is set forth at pages 466-496 of the trial minutes.) Actually, ADA Lombardino recognized that the two statements did not completely correspond and attributed any discrepancy to the fact that, in the formal interrogation, Tanner "started to hedge" (274).*

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* Similarly, ADA Nicolosi said that during the formal interrogation Tanner was "a little more evasive" (343).

Detective Katz was more forthright in acknowledging that Tanner's incriminatory statement was derivable only from the dry run:

> "Whatever I had testified today was not in the [Q & A] statement, there were other things which I testified to which wasn't in that statement" (216).

None of the foregoing testimony, of course, was referred to by the New York Court of Appeals.

As previously mentioned, in its charge the trial court recognized that resort must be had to the dry run to support the admission of the incriminatory statement of Tanner on which the prosecution relied.

Unlike the Court of Appeals Judge Costantino recognized that the self-incriminating statement made by Tanner was admitted at trial although it had not been disclosed at the Huntley hearing. His Memorandum and Order, however, upheld its admission on two grounds both of which are debatable.

First, Judge Costantino said that the statement was made after proper Miranda warnings had been given. Whether in fact this is so is arguable. It appears that, at best, only one of the three witnesses who testified as to the incriminatory statement indicated that any Miranda warning preceded it. In any event, a Jackson v. Denno hearing, as discussed earlier,is a vehicle by which prior to trial counsel may explore, before the Judge alone, all of the aspects of the voluntariness of a confession. Tanner was deprived completely of this right so far as the incriminatory statement here under discussion was concerned.

Second, Judge Costantino concluded that any error was harmless in view of the storng evidence otherwise of Tanner's guilt. There is no development of this thought, and it is difficult to know what is meant. The self-incriminatory statement which was concealed at the Huntley hearing is by far the most important single piece of evidence connecting Tanner with the crime. The other incriminating evidence is largely the testimony of the co-indictee Fulmore who turned State's evidence and is obviously suspect.

CONCLUSION

This Court should determine that the inculpatory statements of Tanner were unlawfully admitted in evidence at his trial. The District Court should be directed to issue a writ of habeas corpus.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* CARLSON TANNER, JR., Appellant.

Argued January 5, 1972; decided March 15, 1972.

Crimes — admissions — admissibility — admissions made by defendant to police were suppressed because of failure to give adequate Miranda warnings — court justified in holding subsequent statements made to Assistant District Attorney had been voluntarily made and were admissible — no factual basis to require finding that subsequent statements were tainted by earlier ones — ade-

Points of Counsel

quate notice given that statement would be offered at trial — sentences imposed for robbery and manslaughter, to run consecutively, permissible — robbery and homicide were successive separate acts.

1. As a result of a *Huntley* hearing, admissions made by defendant to the police were suppressed because of the failure to give adequate *Miranda* warnings. Admissions made to an Assistant District Attorney, concededly preceded by warnings on a preliminary oral examination, not recorded, and an examination recorded and transcribed in questions and answers, were not suppressed. The court, as a result of the hearing, was justified in holding the statements made to the Assistant District Attorney had been voluntarily made and were admissible. Whether an accused believes himself so committed by a prior statement that he feels bound to make another is a fact question. No factual basis appears in the record to require a finding that the subsequent statements were "tainted" by the earlier ones.

2. Defendant received adequate notice that the exploratory examination statement would be offered at the trial.

3. There was no such inconsistency between the exploratory statement and the question and answer statement as to require its suppression.

4. The charge to the jury on the essential elements of robbery was properly given.

5. The sentences imposed for robbery and for manslaughter, to run consecutively, were permissible within section 70.25 of the Penal Law. The robbery and homicide were successive separate acts and not a single act.

People v. *Tanner*, 36 A D 2d 690, affirmed.

APPEAL, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered February 1, 1971, affirming a judgment of the Supreme Court (EDWARD THOMPSON, J.), rendered in Queens County upon a verdict convicting defendant of robbery in the first degree, manslaughter in the second degree and possession of weapons and dangerous instruments and appliances as a felony.

G. Clark Cummings and *Robert Kasanof* for appellant. I. The failure to give defendant proper warnings when he was first taken into custody violated defendant's privilege against self incrimination. (*Harney* v. *United States*, 407 F. 2d 586; *Evans* v. *United States*, 375 F. 2d 355; *United States* v. *Pierce*, 397 F. 2d 128; *People* v. *Ruppert*, 26 N Y 2d 437; *United States ex rel. Stephen J. B.* v. *Shelly* 430 F. 2d 215; *People* v. *Stephen J. B.*, 23 N Y 2d 611.) II. The alleged incriminatory statement of defendant made during exploratory interrogation

was not admissible. The People improperly failed to inform defendant, prior to trial, that testimony derived from the exploratory interrogation would be introduced at the trial. (*People* v. *Remaley*, 26 N Y 2d 427.) III. The People violated section 813 (subd. f) of the Code of Criminal Procedure by failing to disclose at the *Huntley* hearing that they intended to rely on the exploratory interrogation as well as the subsequent written record of the interrogation. (*People* v. *Huntley*, 15 N Y 2d 72.) IV. As a matter of public policy the alleged incriminatory statement was inadmissible since it does not appear in the subsequent written record of the interrogation. V. The court erred in failing to charge that defendant could not be convicted of robbery unless defendant had a specific intent to rob. (*People* v. *Lupo*, 305 N. Y. 448; *People* v. *Gonzalez*, 293 N. Y. 259.) VI. The sentence was erroneous to the extent that the sentences for robbery and manslaughter run consecutively rather than concurrently.

Thomas J. Mackell, District Attorney (*Martin L. Bracken* of counsel), for respondent. I. Appellant's guilt was established beyond a reasonable doubt. II. The trial court properly allowed the introduction of appellant's admission to Assistant District Attorney Lombardino even though it suppressed appellant's previous admission to Detective Katz. (*United States ex rel. Stephen J. B.* v. *Shelly*, 305 F. Supp. 55, 430 F. 2d 215; *Clewis* v. *Texas*, 386 U. S. 707; *Davis* v. *North Carolina*, 384 U. S. 737; *Lyons* v. *Oklahoma*, 322 U. S. 596; *Commonwealth* v. *White*, 353 Mass. 409, 391 U. S. 968; *Myers* v. *Frye*, 401 F. 2d 18; *Commonwealth* v. *Moody*, 429 Pa. 39, 393 U. S. 882; *People* v. *Leonti*, 18 N Y 2d 384; *People* v. *Ruppert*, 26 N Y 2d 437; *People* v. *Yukl*, 25 N Y 2d 585.) III. Appellant received a fair and impartial trial. (*People* v. *Remaley*, 26 N Y 2d 427; *People* v. *Ross*, 21 N Y 2d 258; *People* v. *Dudley*, 24 N Y 2d 410; *People* v. *Eisenberg*, 22 N Y 2d 99.) IV. The trial court's charge was proper and did not deprive appellant of a fair trial. V. The sentence was legal and appropriate. (*People ex rel. Maurer* v. *Jackson*, 2 N Y 2d 259.)

BERGAN, J. Defendant has been sentenced in Queens County to a maximum of 40 years for robbery first degree, manslaughter

second degree and felonious possession of weapons and instruments. Proof was adequate that defendant and a companion held up a taxi driver and robbed him and that, after the robbery was completed and while the taxi driver was sitting in the cab offering no resistance, this defendant opened the door of the cab, shot and killed the driver. The crime was established both by defendant's confessions and by the testimony of Kenneth Fulmore, an accomplice. The sufficiency of the evidence to establish defendant's guilt quite beyond a reasonable doubt is not raised on this appeal.

The main questions raised turn on the effect and relationship of successive admissions elicited from defendant while in custody, the first by police after his arrest; the second a "dry run" or preliminary oral examination made by an Assistant District Attorney, not recorded, and the third an examination of defendant by the Assistant District Attorney recorded and transcribed in questions and answers.

The first admissions to the police were suppressed on consent of the People in the *Huntley* hearing by the hearing Judge because of the failure to give adequate *Miranda* warnings; but the court did not suppress the admissions made to the Assistant District Attorney which defendant conceded at the hearing were preceded by warnings, and these admissions in both the preliminary examination and the recorded examination were admitted on the trial.

Appellant argues that the suppressed admissions were so related to the subsequent ones that they "tainted" them and made them inadmissible; that he did not receive sufficient notice from the People that the "dry run" or "exploratory" unrecorded examination by the Assistant District Attorney would be offered on the trial; and that, in any event, the "exploratory" examination was inadmissible because some of it did not appear in the more formal and reliable transcribed statement.

A man who makes admissions under duress or in violation of his constitutional right to warning and advice may feel so committed by what he has then said that he believes it futile to assert his rights after he has been later advised of them before new questioning begins. This state of mind may have an effect

on the waiver leading to the later admissions; or on the voluntary nature of those admissions.

An interrelationship between statements was one of the grounds leading to the decision in *United States ex rel. Stephen J. B.* v. *Shelly* (430 F. 2d 215) which sustained a Federal habeas corpus order after this court had affirmed the conviction (*People* v. *Stephen J. B.*, 23 N Y 2d 611). The Federal court found the admission of the petitioner there, a 16-year-old boy, was not based on an intelligent waiver, and one factor, not apparently the controlling one, was the finding by the Federal court that having made a prior statement improperly elicited this let " the cat out of the bag " and affected his subsequent statement (430 F. 2d, p. 219).

Other reasons, however, among them the youth and inexperience of the petitioner, affecting ability to make a meaningful waiver, entered into the grounds laid down in the decision to which one Judge dissented and another agreed only to a footnote to the opinion (p. 219).

Whether an accused believes himself so committed by a prior statement that he feels bound to make another, depends on his state of mind which is a fact question. Appellant testified at the *Huntley* hearing. He did not say that his prior statement had any effect on his later statement to the Assistant District Attorney.

He testified he was then advised of his right to a lawyer but did not ask for one and made the subsequent statement because " I was scared ". He continued to be afraid because the policeman had previously " promised to kill me ".

The hearing Judge held the testimony of appellant incredible and found the statement had been voluntarily made. Although counsel for appellant raised the question before the hearing Judge that the subsequent statement was " tainted " by the earlier ones, no factual basis for this appears in the record, not even the defendant's own expression of his state of mind. Nor did counsel state the " cat-out-of-the-bag " theory to be a ground of " taint ". The court, accordingly, was justified in holding the statement made to the Assistant District Attorney admissible.

The court does not reach on this record, therefore, and need not now decide, whether on a factual finding of association

between an earlier invalid admission and a later one, validly safeguarded, there must be suppression. The decisions in *People* v. *Stephen J. B.* (23 N Y 2d 611, *supra*), *Commonwealth* v. *White* (353 Mass. 409, cert. den. 391 U. S. 968) and *Lyons* v. *Oklahoma* (322 U. S. 596) seem to sustain admission of the statements taken by the Assistant District Attorney.

As to notice that the " exploratory " or " dry run " examination by the Assistant District Attorney would be offered on the trial, as well as the recorded statements, defendant received fully adequate notice. The People gave notice pursuant to the former Code of Criminal Procedure (§ 813-f) that they intended to offer statements attributed to defendant.

At the *Huntley* hearing there was extensive testimony as to the warnings given by the Assistant District Attorney before any admissions were made. Defendant inquired fully into this examination. Thus defendant was advised of the nature of this preliminary questioning and of its circumstances and had adequate notice that his admissions would be offered at the trial.

At the end of the *Huntley* hearing the hearing Judge ruled not only that defendant had been given *Miranda* warnings by the Assistant District Attorney, but that the statement given, later " reduced to writing ", was voluntary and admissible. Defendant's counsel could not reasonably believe that this preliminary statement would not be offered on the trial. He was not left uninformed on this. Thus *People* v. *Remaley* (26 N Y 2d 427) does not support appellant's argument.

Nor was there any such inconsistency between the dry-run exploratory statement and the question and answer statement as to require its suppression because it does not " appear " in the latter. The Assistant District Attorney testified on cross-examination that the two statements correspond factually " in substance ".

Appellant complains also about the charge to the jury on " specific intent " to commit robbery. The main charge covered the essential elements of robbery, especially where, as here, it was charged two men acted together in a conspiracy to rob. Among other things, the Judge said that a conspiracy may be an agreement to do an unlawful act, motivated " by criminal intent ".

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The purpose and intent to rob were elsewhere adequately explained to the jury and the People point out that section 160.15 of the Penal Law, defining robbery in the first degree, does not require a specific intent. A robbery such as this could scarcely happen without a purpose to commit it.

The maximum sentence imposed of 40 years was made up of 25 years for robbery and 15 years for manslaughter to run consecutively. This was permissible within section 70.25 of the Penal Law. The robbery and homicide were not a "single act". They were successive separate acts under the record here, where the shooting of the victim appears as an unnecessary afterthought (*People ex rel. Maurer* v. *Jackson*, 2 N Y 2d 259).

The order should be affirmed.

Chief Judge FULD and Judges BURKE, SCILEPPI, BREITEL, JASEN and GIBSON concur.

Order affirmed.